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Supreme Court, U.S.
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No. 97-638

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON who are Members of Syndicate No. 553, as Subscribers to Contracts of Reinsurance with Transit Casualty Company, and C.J. Warrilow, an Underwriter at Lloyd's of London, Individually, and on behalf of Certain Underwriters at Lloyd's of London who are Members of Syndicate No. 553,

Petitioners,

v.

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

Most of Respondent's brief is devoted to arguing the merits of the district court's refusal to compel arbitration in this case, rather than the correctness of the Eighth Circuit's ruling that it lacked appellate jurisdiction to review that decision, which is the only issue raised by the Petition. Respondent does not confront the irreconcilable conflict the Eighth Circuit has created between United States law and policy favoring enforcement of international arbitration agreements and the objectives of efficient and expeditious disposition of federal court litigation served by the limitations on appellate review contained in 28 U.S.C. §1447(d). There is no evidence that Congress has ever considered these policies opposed; indeed as shown below, Congress has broadened the appealability of district court orders hostile to arbitration. The conflict is a needless one—generated solely by the Court of Appeals' failure to recognize that the district court's subject matter jurisdiction over the arbitration agreements at issue in this case depends only on the nationality of the parties to the agreement and relation to a foreign country. 9 U.S.C. §202. Whether an arbitration agreement over which the district court has subject matter jurisdiction can or should be enforced by the district court is an altogether different question. There are a number of grounds upon which a district court might refuse to enforce an arbitration agreement falling under the Convention—a number of which Respondent argues are applicable to the agreement at issue here. The Eighth Circuit, however, decided none of these issues and they are not at issue on this Petition. What the

Eighth Circuit decided is that the district court's refusal to *enforce* the arbitration agreement pursuant to 9 U.S.C. §206 also constituted a finding that the agreement was not one falling under the Convention as described in 9 U.S.C. §202, over which the district court had subject matter jurisdiction by virtue of 9 U.S.C. §203. The Court of Appeals reached this independent conclusion despite the fact that the words and context of the district court's opinion reflect an awareness of the difference between jurisdiction and enforceability. In the time since the district court's decision in the case at bar, the district court, expressly relying on its reasoning in the instant case, has remanded three more actions commenced by Respondent against Transit Casualty reinsurers and removed to federal court, one of which was removed on diversity jurisdiction grounds—additional evidence that the Court's remand orders were not based on a lack of removal jurisdiction, as the Court of Appeals incorrectly surmised.

II.

Contrary to the assertion made at page 15 of Respondent's brief, Congress has included an explicit provision in the Federal Arbitration Act to grant the Courts of Appeals appellate jurisdiction to review such rulings. In 1988, Congress amended Title 9 to provide for immediate appellate review of district court denials of applications to compel arbitration under 9 U.S.C. §16(a)(1)(C). This section does not distinguish among the various grounds upon which such an application might be denied. Ironically, if the District Court had refused to enforce an identical domestic arbitration agreement on the same

grounds, that ruling would be immediately appealable by virtue of Section 16, even though Congress has not invested the district courts with original or removal jurisdiction to enforce domestic arbitration agreements, as it has in the case of international agreements.

III.

There is no merit to the assertion at page 4 of Respondent's brief that Petitioners made no affirmative effort to enforce the arbitration agreement in the lower courts. Examination of the record in the district court would show that Petitioners raised the arbitration agreement as a defense to the Respondent's state court suit. Petitioners stated in their removal petition that they were removing the action in order to compel the Respondent to abide by its agreement to arbitrate. In both the state court and the federal district court, Petitioners sought dismissal of the Respondent's suit on the ground that the arbitration agreement barred the suit. Dismissal is a proper remedy when a court finds that a judicial proceeding is precluded by an arbitration agreement, because it places the decision to seek redress in an arbitral forum, or forego it altogether, in the hands of the party who initiated the precluded litigation. *See Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993). Both the Eighth Circuit and the district court understood that Petitioners were seeking to compel arbitration and ruled in that context. *See* Petition A3 ("The underwriters sought to compel Transit to arbitrate its claims in accordance with an arbitration clause contained in the reinsurance agreements."), C2 ("[D]efendant removed this case to compel plaintiff to arbitrate.").

IV.

Respondent's effort to trivialize the import of the Eighth Circuit's narrow interpretation of its appellate jurisdiction is belied by its own words. As Respondent points out at page 2 of its brief, the Transit liquidation involves contracts with some 900 reinsurers and Respondent considers reinsurance recoveries the principal asset available for the payment of some 200,000 creditors. Respondent also makes it clear that it expects the interests of the liquidation proceeding, the Missouri statutes governing it, and all the orders entered by the Circuit Court of Cole County, Missouri in connection therewith, to be honored in all other jurisdictions. As pointed out above, the Respondent continues to initiate breach of contract actions against reinsurers in disregard of binding arbitration agreements and the district court continues finding the agreements unenforceable on removal and remanding them regardless of the basis for removal jurisdiction. If the Eighth Circuit's narrow interpretation of the reviewability of such decisions is not corrected, and if other Circuits adopt it, a large number of district court decisions inimical to the nation's strong policy favoring international commercial arbitration can be expected to go unreviewed.

Respectfully submitted,

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